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No.

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IN THE
SUPREME COURT
OF THE UNITED STATES
October Term, 1984

JOSE RODRIGUEZ OSPINA,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

DOES A CONVICTION VIOLATE THE DUE PROCESS STANDARDS OF *JACKSON v. VIRGINIA* (1979) 443 U.S. 307, WHERE THE ONLY EVIDENCE ADDUCED AT TRIAL IS THAT PERSONS WHOM THE DEFENDANT MET AND BRIEFLY TRAVELLED WITH WERE SECRETLY CARRYING CONTRABAND?

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UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The petitioner, Jose Rodriguez Ospina, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on August 2, 1984 affirming his conviction, and the order of that Honorable Court entered on March 8, 1985 denying his petition for rehearing en banc.

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit, not yet reported, appears in the Appendix hereto, as does the Order of the Court denying the petition for rehearing en banc. No opinion was rendered by the United States District Court for the Central District of California.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on August 2, 1984. A timely petition for rehearing en banc was denied on March 8, 1985. This petition is filed within sixty days of that date. The jurisdiction of this Honorable Court is invoked under Title 28, United States Code, Section 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States provides that:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due

process of law; nor shall private property be taken for public use, without just compensation."

STATEMENT OF THE CASE

Defendant, Jose Rodriguez Ospina, together with certain named co-defendants, was charged by grand jury indictment in Count I with conspiracy to possess cocaine with intent to distribute the same and in Count II with possession of cocaine with intent to distribute the same, all in violation of Title 21, United States Code, Sections 846 and 841(a)(1). Defendant pled not guilty and proceeded to trial by jury, at the conclusion of which he was found guilty as charged.

Defendant's motions for a new trial and for entry of a judgment of acquittal were denied by the District Court, and he was then sentenced to concurrent eight year terms of imprisonment on each count, which he is presently serving. Defendant filed a timely notice of appeal, and on appeal the Ninth Circuit Court of Appeals affirmed the judgment of conviction and denied the petition for rehearing en banc. This Petition for a Writ of Certiorari follows.

STATEMENT OF FACTS

The material evidence here, which the Court of Appeals held sufficient to sustain defendant's conviction, is notably insubstantial. It consists of the following:

On March 27, 1983 defendant rented a room at the Westwind Motel in Downey, California after arriving in Los Angeles on a commercial flight from San Francisco. On the same day co-defendant Cabezas rented two rooms at the Imperial 400 Hotel in Long Beach, California.

On the next day, March 28, 1983, co-defendants Carrera and Rivera, with bulges under their clothing, departed a freighter docked in the harbor. After joining and separating a number of times, Carrera and then Rivera entered the El Sirrocco restaurant. Carrera was carrying what appeared to be an empty brown tote bag.

Rivera left the El Sirrocco restaurant without any bulges, and proceeded to the El Pollo Lico restaurant, which he soon exited with Cabezas. Carrera later exited the El Sirrocco restaurant without any bulges and carrying the brown tote bag which appeared to have something in it.

Defendant was in the front seat of a nearby cab with a paper bag containing aluminum foil and towels. Carrera, still carrying the tote bag, and then Cabezas, entered the back seat of the cab. Defendant instructed the driver of the cab to drive to a motel in Downey.

When the surveilling law enforcement officials stopped the cab they searched the tote bag found in the back seat of the cab with Carrera and found twelve packages of cocaine. Rivera was later found at the Imperial 400 Hotel.

Business cards found on the dresser in defendant's motel room contained handwritten notations which included the phone number of the Imperial 400 Hotel, the number of one of the rooms Cabezas had rented there, and the address of the El Sirrocco restaurant.

From this evidence the jury could properly find that defendant purposefully met Carrera and Cabezas. There is not one scintilla of evidence, however, that defendant in any way knew of the existence or presence of the cocaine, or was knowingly acting or participating in any conduct related to the criminal activity of the others with respect to that cocaine.

REASONS FOR GRANTING THE WRIT

The Case At Bench Is In Direct Conflict With A Multitude Of Decisions Of The Courts Of Appeals And Contravenes The Clear Due Process Of Law Principles Expressed In *Jackson v. Virginia* (1979) 443 U.S. 307

In determining whether a criminal conviction is founded upon sufficient substantial evidence so as not to offend the due process clause of the Fifth Amendment, a reviewing court must determine whether "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (*Jackson v. Virginia* (1979) 443 U.S. 307, 319, 99 S.Ct. 2781, 1789, 61 L.Ed.2d 560 (emphasis in original)).

The clear effect of the published Opinion in the case at bench, however, is to announce a rule of law that one can be convicted of criminal acts solely upon proof that one knowingly met and travelled with men whom it later turned out were carrying drugs in closed containers.

To affirm a conviction upon such scanty evidence offends the fundamental constitutional principles requiring proof beyond a reasonable doubt. Neither in logic, nor in law, does such evidence permit a criminal conviction of the defendant for engaging in illegal conduct.

Throughout the entirety of these proceedings defendant has cited numerous decisions, including, *United States v. Martinez* (9th Cir. 1975) 514 F.2d 334, *United States v. Weaver* (9th Cir. 1969) 594 F.2d 1272, *Murray v. United States* (9th Cir. 1968) 403 F.2d 694, *United States v. Delgado* (9th Cir. 1964) 327 F.2d 641, *United States v. Jones* (9th Cir. 1974) 518 F.2d 64, and *United States v.*

Flom (9th Cir. 1972) 464 F.2d 554, for the proposition that such evidence is legally insubstantial.

Each of these decisions is directly applicable to the case at bench. Each held that evidence of the nature presented here is legally insufficient to sustain a conviction. These cases meticulously explain that purposeful association with others who are found to be carrying concealed contraband, even in circumstances far stronger than those in the case at bench, is simply not enough evidence under the law to permit a conviction.

In each such case, while this evidence may give rise to suspicion, it does not prove illegal conduct under any accepted standard of appellate review. If these cases are to have any meaning, the principles expressed therein must be applied to the case at bench.

In *United States v. Martinez* (9th Cir. 1975) 514 F.2d 334, the Court of Appeals held that similar, but far stronger evidence than was presented in the case at bench, was legally insufficient to support a conviction. While lengthy, the facts as set forth in *Martinez*, at pages 336-337, are worthy of recitation here to demonstrate our position by comparison:

> "Appellant Martinez drove a Lincoln Continental sedan across the border from Mexico to Nogales, Arizona. In the front passenger seat were appellant Sidle on the left behind Martinez, and Dabney on the right behind Davis. The car was searched at the border customs and immigration station. In a facial tissue box on and in the center of the dashboard agents found a 'ziplock' plastic bag containing 117 grams of cocaine. In Sidle's pocket they found a small gilt or gold cocaine spoon on a gold or gilt chain. The spoon, which is

very small, appeared to have a residue on it. The car was leased to Dabney. It was not the usual rental agency car. Davis had $1,000 in cash on her person. When asked about the spoon, Sidle said that it was Dabney's. Dabney said that the spoon was hers, that she did not want to see the other three go to jail and was willing to take the blame, and that she loved cocaine. Neither Martinez nor Sidle admitted knowledge that cocaine was in the car.

"No fingerprints were taken from the plastic bag containing the cocaine or from the facial tissue box. A government chemist testified that 'it appeared that there was something on the bowl of the spoon, but that it was not possible to 'make out what it was' until it was placed under a microscope. The chemist also testified that 'an experienced person glancing briefly at something like that, not knowing what to expect, probably would not readily distinguish there was something there. If someone who is familiar with things like this, for whatever they are more or less generally thought to be used for, inexperienced [sic-experienced?] in working with things like that, and were suspected, prohibited or controlled materials, there was enough there that an experienced person would in a brief examination be able to detect that there were things there.' In order to determine what the residue on the spoon was, the chemist rinsed it off the spoon and employed chemical tests. He did not determine the amount of material on the spoon. He testified that there was less than one-tenth of a gram (less than

1/280th of an ounce), but did not say how much less.

"Sidle did not take the stand, but *Martinez did*. Martinez's story was that Sidle, whom he had known for about three months, and the two women, whom he had never met, came to his house and asked him to go to Mexico as their chauffeur and translator. Martinez speaks fluent Spanish. The object of the trip was to 'party' for a couple of weeks, with Dabney and Davis 'treating'. On cross-examination, Martinez said that for the entire 'few days' while the four were in Mexico until the day they were arrested, they were together. However, he claimed that on that day the four of them were in a Canal Street bar drinking when the two women left at about noon and returned at about one or one-thirty (p.m.), and asked Martinez and Sidle to take them back to the United States. According to Martinez, the four then left the bar and 'rode around town for a little bit more and then from there we went out to the border.' Asked at what time they arrived at the border, Martinez replied that '[i]t was pretty dark. It was getting dark. I guess we got to the border about 4:00 or 3:00 o'clock.' Martinez also admitted that he had once tried cocaine 'about three years ago' but said he hadn't liked it and had returned to drinking. However, he denied familiarity with the appearance of cocaine. On cross-examination, he admitted that he knew that cocaine 'looks like sugar' and is a 'white powder.'"

In reviewing the sufficiency of the evidence the Court of Appeals expressly stated, at page 338, that "we have found

no decision of our affirming a conviction on facts as weak as these."

It then held, at page 339, that items of contraband found on another person in the car or within containers not obviously in the driver's possession, could not be held to be under the dominion and control of the driver. This is precisely the position of the defendant here, who was convicted on the basis of much weaker circumstantial evidence.

Martinez itself cited another Ninth Circuit case which is also stronger on its facts than the case at bar, but was reversed by the Ninth Circuit because of insufficiency of the evidence. In that decision, *Murray v. United States* (9th Cir. 1968) 403 F.2d 694, two brothers drove to Mexico in a borrowed car. Lonnie was driving and at the border, upon their return to the United States, heroin was found secreted on Johnnie's person. The trip was Lonnie's idea and he had a stronger personality than Johnnie. The Ninth Circuit reversed Lonnie's conviction because, as stated at page 696, "he had [not] personally shared custody of [the drug] as to give him the power of disposition."

The Court in *Martinez*, at page 339, likewise held that the important similarity between that case and *Murray* was that the driver did not have sole dominion and control over the container or place where the contraband was located. The same is true in the case at bench.

Martinez then went on to discuss another Ninth Circuit case, *United States v. Delgado* (9th Cir. 1964) 327 F.2d 641. There marijuana was found in the bedroom of an unmarried couple living together. The Court stated at page 642, in reversing the judgment of conviction, that "it is fundamental to our system of criminal law that guilt is individual. Here, that means that there must be sufficient

evidence to support a finding as to each defendant that he or she had possession of the marijuana."

With respect to the concept of inferring knowledge from a joint venture, as in this case, the Court in *Martinez*, at page 340, explained the following: "For a conviction to be sustained the government must have shown something more than a joint venture which indicates that a particular defendant had knowledge of the contraband."

Similarly, in *United States v. Jones* (9th Cir. 1965) 518 F.2d 64, the facts held legally insufficient to support conviction were as follows:

> "Appellant was driving an automobile with a Miss Turner as passenger across the border between the United States and Mexico. The automobile, Miss Turner and the appellant were searched. No narcotics were found in the automobile or on the person of the appellant. After a protracted searching procedure, the heroin upon which defendant's conviction is predicated was found in a condom secreted in Miss Turner's vagina.
>
> Defendant's eyes were pinpointed, his speech slurred, and he had needle marks on his arms. The evidence indicated that appellant and Miss Turner went to Mexico together to shop, returned together with appellant driving his father's automobile, and that both had needle marks and appeared to be under the influence of drugs. There is no direct evidence indicating that appellant knew that Miss Turner had secreted heroin in her vagina with the intention of importing it into the United States. Appellant may have invited Miss Turner to join him for a day in Mexico to purchase and inject heroin there, with a

> specific warning to her not to bring any heroin back to the United States. The evidence introduced is equally supportive of a conclusion that Miss Turner acted on her own, without appellant's knowledge, in purchasing, secreting, and attempting to import the heroin."

Likewise, in *United States v. Flom* (9th Cir. 1972) 464 F.2d 554, the facts held insubstantial, as described by the Court of Appeals, were as follows:

> "The Government proved that Flom and his long time friend Daniel Atkinson went to Mexico together. While separated from Flom, Atkinson purchased heroin and secreted it in his body. The men reentered the United States on foot, and were detained because they were nervous and appeared to be under the influence of drugs. Flom had recent needle marks on his arms, but a strip search was negative. A strip and body search of Atkinson revealed the heroin."

Finally, note should be made of the recent decision of the Eleventh Circuit in *United States v. Kelly* (11th Cir. 1985) 749 F.2d 1541. In a case dramatically like the instant case, the Court of Appeals, at pages 1548-1549, had little trouble in reversing the conviction of the defendant Garcia, in the following language:

> The jury convicted Evasio Garcia of conspiracy to import and conspiracy to possess with the intent to distribute. Garcia characterizes the evidence regarding him as mere presence in a suspicious climate of activity. Garcia reasons that his inspection of the "Gigi" to determine its seaworthiness is consistent only with the conclusion that the was a surveyor of the boat for Brown.

Further, his presence at Brown's home after the inspection, as well as his presence in the car parked near the driveway of Brown's house contemporaneous with the boarding of the "Gigi" by government agents, is insufficent to support a conclusion of conspiratorial intent. The government argues that Garcia "inspected the "Gigi" to ascertain if it suited the smugglers' needs." Further, the government attributes to Garcia participation in the"arrangements to dispose of their cargo."

We find that the evidence was insufficient for a jury to conclude that Evasio Garcia was guilty of conspiracy to import and conspiracy to possess with intent to distribute. The relevant acts of Evasio Garcia are his inspection of the "Gigi," his presence at a meeting of Cejas, George Garcia, Taute, and one other person, and his presence in a vehicle with Taute near Brown's driveway. His acts differ substantially from those of the other appellants. He has not been connected to instrumentalities of the distribution and importation schemes such as would have suggested that he was a conspirator. In this regard, he is unlike George Garcia who had a special code name for use of the walkie-talkie and used a telephone to ask Brown to locate a shrimp boat. He is unlike Falcon, Kelly, and Dennis Dorn who were on the boat loading the marijuana; and he is unlike Jon Taute who was on the lead boat and admitted that he was part of the importation and distribution scheme. As Garcia argues, all the record shows is that he was an acquaintance of Brown. The more reasonable inference from Garcia's acts in this

> case are that Brown requested that Garcia inspect the boat without making him aware of its ultimate purpose. As well, Garcia could have been present in Brown's house as a social guest. No evidence exists that the affairs of the importation and distribution schemes were discussed with Evasio Garcia. Finally, his presence in the car in the early hours of November 28 is mere presence. No inference of guilt can be reached based on his prior acts. A reasonable jury could not conclude that Evasio Garcia was a co-conspirator in the importation and distribution schemes. Accordingly, insufficient evidence exists to sustain the jury's verdict of guilty of conspiracy to import and conspiracy to possess with intent to distribute.

We learn from this uniform line of case law decisions that the government's proof in the case here in question, was not sufficient under the Due Process Clause to permit the defendant's conviction to stand.

Under our system of justice, reviewing courts must be vigilant in ensuring that criminal convictions are predicated upon proof of such a nature that a "rational trier of fact could have found the essential elements of the issue beyond a reasonable doubt." (*Jackson v. Virginia* (1979) 443 U.S. 307, 319). As we have demonstrated above, the evidence adduced at the trial below did not meet this standard.

CONCLUSION

For all of the reasons set forth above, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

RICHARD G. SHERMAN
Counsel for Petitioner

APPENDIX

For Publication

Filed Aug. 2, 1984
PHILLIP B. WINBERRY
Clerk, U.S. Court of Appeals

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
vs.
JOSE RODRIGUEZ OSPINA,
Defendant-Appellant.

No. 83-5249
D.C. No. CR 83-278-TJH

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
vs.
OILSIN CABEZAS,
Defendant-Appellant.

No. 83-5227
D.C. No. CR 83-278-TJH

OPINION

Appeal from the United States District Court
for the Central District of California
Terry J. Hatter, District Judge, Presiding
Argued and Submitted June 5, 1984

Before: CHOY and SKOPIL, Circuit Judges, and WILKINS,* District Judge

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* Honorable Philip C. Wilkins, Senior United States District Judge for the Eastern District of California, sitting by designation.

WILKINS, District Judge:

Jose Rodriguez Ospina and Oilsin Velasco Cabezas appeal from convictions of conspiracy to possess cocaine with intent to distribute, in violation of 21 U.S.C. § 846, and possession of cocaine with intent to distribute, in violation of 21 U.S.C. § 841. Co-conspirators and co-defendants Carlos Carrera and Vicente Romero Rivera, who were also convicted of the same offenses, are not involved in this appeal. Each appellant appeals on the ground that the evidence was insufficient to support his conviction, and that certain evidence was improperly admitted. Ospina additionally contends that the trial judge erred in refusing to admit into evidence statements made by co-defendants Carrera and Cabezas which were exculpatory as to him. We affirm the convictions of both defendants.

FACTS

On March 27, 1983 appellant Ospina rented a room at the Westwind Motel in Downey, California, after arriving in Los Angeles on a commercial flight from San Francisco. On the same day appellant Cabezas rented two rooms at the Imperial 400 Hotel in Long Beach, California.

On the next day, March 28, 1983, the Colombian freighter *Ciudad de Nieva*, which was docked in the Los Angeles-Wilmington Harbor, was under surveillance by a task force of federal, state, and local law enforcement officers who observed co-conspirators Carrera and Rivera entering the ship around 12:30 p.m. About 12:50 p.m. Carrera was observed leaving the ship with his jacket zipped all the way to the top even though the day was warm and sunny, and with a noticeable bulge in the lower back portion of the jacket. About five minutes later Rivera was observed

leaving the ship likewise wearing a closed jacket with an unnatural bulge in the rear. After walking separately for several blocks, the two men met in front of a liquor store on Anaheim. Rivera was observed going into the liquor store and emerging about one minute later with a paper bag in his hand while Carrera made a telephone call. The two suspects then proceeded west on Anaheim to the intersection of Anaheim and Broad, where Carrera turned north and Rivera continued on Anaheim. Carrera obtained a brown tote bag, which appeared to the surveilling officers to be empty, and proceeded to the El Sirrocco Restaurant on Anaheim Street. Rivera went into the El Sirrocco Restaurant right after Carrera, and after five minutes was observed leaving that restaurant minus the previously observed bulge at his waist and proceeding to the El Pollo Lico Restaurant, which he came out of a few minutes later with appellant Cabezas. Carrera exited the El Sirrocco Restaurant after about ten minutes without the earlier unnatural bulge and carrying the brown tote bag, which now appeared to have something in it.

Carrera then proceeded to a parking lot at the southwest corner of Avalon and Anaheim where he got into the back of a taxicab, still carrying the brown tote bag, and was followed into the back of the cab by appellant Cabezas. The cab was already occupied by appellant Ospina, who was sitting in the front passenger seat with a paper bag containing aluminum foil and towels. Ospina instructed the driver of the cab to drive to a motel in Downey, giving him the written address.

The cab proceeded in the direction of Downey, and was stopped about an hour and a half later on the San Diego Freeway by law enforcement officers who had been keeping it under surveillance. Twelve packages containing 5,762.4

grams or 12.7 pounds of cocaine were found in the brown tote bag, and Carrera, Ospina, and Cabezas were arrested. Co-defendant Rivera was later arrested at the Imperial 400 Hotel where he returned.

Business cards were found later on the dresser in Ospina's room in Downey containing handwritten notations on the back. The notations included the phone number of the Imperial 400 Hotel and one of the room numbers which Cabezas had rented there, and the address of the El Sirrocco Restaurant in Wilmington where the cocaine was transferred into the tote bag and the three co-conspirators entered the taxicab.

DISCUSSION

I. SUFFICIENCY OF THE EVIDENCE.

Both appellants contend that the evidence produced at trial was insufficient to support their convictions. We do not agree.

When reviewing the sufficiency of the evidence to support a criminal conviction, the appellate court must determine, after viewing the evidence in the light most favorable to the prosecution, whether "*any* rational trier of the fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed. 2d 560 (1979); *United States v. Becker*, 720 F.2d 1033, 1035 (9th Cir. 1983).

The testimony of several law enforcement officers involved in the surveillance and arrest and of the taxicab driver established that both appellants were in the taxicab with the contraband when it was seized, and that Ospina

was exercising control over the cab by securing the cab and directing the driver to go to his motel room in Downey. Business cards found in Ospina's motel room, which were properly admitted into evidence, indicated that he was in contact with the other three conspirators and that the meeting at the El Sirrocco Restaurant to pick up the cocaine was prearranged. Further testimony and a hotel receipt found in Cabezas' pocket established that Cabezas had rented the rooms at the Imperial 400 Hotel for the conspirators, and that he arrived at the prearranged corner at the proper time for the transfer of the cocaine. The jury had ample evidence of acts by these appellants in furtherance of the conspiracy to support their convictions.

II. ADMISSIBILITY OF THE EVIDENCE FOUND IN OSPINA'S ROOM AND ON THE PERSON OF CABEZAS.

Appellants rely on *United States v. Ordonez*, 722 F.2d 530 (9th Cir. 1983), *petition for rehearing pending*, for their contention that two business cards found in Ospina's room after his arrest and a motel receipt found on Cabezas at the time of his arrest should not have been admitted into evidence. One of the business cards had the phone number of the Imperial 400 Hotel where the other conspirators were staying and appellant Cabezas' room number written on it, and the other card contained the address of the location where the cocaine was transferred into the tote bag and where Ospina, Carrera, and Cabezas got into the taxicab with the cocaine. *Ordonez*, the only authority cited by appellants on this point, involved the admissibility of some ledgers for the purpose of showing that the defendant possessed a certain amount of cocaine with intent to distribute on a certain date with no other evidence offered

to support the charges. The court held there that requisite foundational facts were not presented to support admissibility of the ledgers as admissions, as statements of co-conspirators, or as business records. Admissibility of the ledgers as adopted admissions was not considered.

The prosecution contends here that the items in question are not really hearsay in that they were not admitted to prove the truth of the assertions they contained but instead to show the circumstantial relationship of the parties to the scene, to other parties, and to the cocaine. The government contends additionally that the items are admissible as adopted admissions under Federal Evidence Rule 801(d)(2)(B) because the papers were in the possession of the appellants and because Ospina acted on the information written on the cards when he travelled to the address written there to pick up the cocaine.

Other courts have held that possession of a written statement becomes an adoption of its contents, and that when a person acts on written instructions, and the instructions are found in his possession, the instructions are admissible as adopted admissions under Rule 801. *United States v. Marino*, 658 F.2d 1120, 1124-1125 (6th Cir. 1981); *United States v. Canieso*, 470 F.2d 1224, 1232 (2d Cir. 1972). Adopted admissions are not hearsay and may be admitted into evidence. *United States v. Marino, supra*, 658 F.2d at 1125. We find that the evidence challenged in the present case is very similar to that admitted in *Marino* and *Canieso* and that it was properly admitted as adopted admissions.

III. ADMISSIBILITY OF EXCULPATORY STATEMENTS.

Appellant Ospina contends that the trial judge erred in refusing to admit into evidence certain statements against penal interest made by co-defendants Carrera and Cabezas which were exculpatory as to him. These statements were made to customs inspector Jesse Ibarra after their arrest and indicated that the cocaine belonged to them and to no one else.

The prosecution was not permitted to use these statements in their case against Carrera and Cabezas after it was determined in a suppression hearing that *Miranda* warnings had not been given. When Carrera and Cabezas refused to testify on behalf of Ospina, and Ospina made an offer of proof to admit the statements to Ibarra into evidence under Rule 804(b)(3) of the Federal Rules of Evidence, the trial judge found that he had "no basis for determining that there's any trustworthiness to be given to such statements by Mr. Cabezas or Mr. Carrera under the circumstances."

The determination of admissibility of statements against penal interest under Evidence Rule 804(b)(3) is committed to the sound discretion of the trial court, and should not be disturbed on appeal absent an abuse of discretion. Further, the showing of corroborating circumstances must do more than tend to indicate the trustworthiness of the statements; they must clearly indicate it. Factors relevant to trustworthiness include the time of the declaration and the party to whom it was made, the existence of corroborating evidence, the extent to which the declaration is really against the declarant's interest, and the availability of the declarant as a witness. *United States v. Rhodes*, 713 F.2d

463, 473 (9th Cir.), *cert. denied*, 104 S.Ct. 535 (1983); *United States v. Satterfield*, 572 F.2d 687, 690 (9th Cir.), *cert. denied*, 439 U.S. 840 (1978); *United States v. Hoyos*, 573 F.2d 1111, 1115 (9th Cir. 1978); *United States v. Oropeza*, 564 F.2d 316, 325 (9th Cir. 1977), *cert. denied*, 434 U.S. 1080 (1978).

Carrera and Cabezas made the statements after their arrest and after they had already denied any knowledge. The statements lacked spontaneity in that the declarants specifically requested to talk with Ibarra to make the statements after all of the co-defendants had been left together in a detention room. Under the circumstances, the trial judge did not abuse his discretion in finding that trustworthiness was not clearly indicated.

CONCLUSION

The judgment of the district court is AFFIRMED.

Filed Mar. 8, 1985
PHILLIP B. WINBERRY
Clerk, U.S. Court of Appeals

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

No. 83-5249

JOSE RODRIGUEZ OSPINA,
Defendant-Appellant.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

No. 83-5227

OILSIN CABEZAS,
Defendant-Appellant.

ORDER

Before: CHOY and SKOPIL, Circuit Judges, and WILKINS,* District Judge

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

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* The Honorable Philip C. Wilkins, Senior United States District Judge for the Eastern District of California, sitting by designation.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has voted to grant rehearing en banc. Fed.R.App.P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.